

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LAMARR MACON,

Defendant-Appellant.

UNPUBLISHED

May 13, 2003

No. 238439

Saginaw Circuit Court

LC No. 00-019048-FC

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder and assault convictions and two to five years' imprisonment for the CCW conviction, consecutive to a two-year prison term for the felony-firearm conviction. We vacate defendant's conviction and sentence for assault with intent to rob while armed and affirm his other convictions and sentences. We are deciding this case without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the court's instructions concerning accident as it related to the murder charge. Specifically, defendant argues that the court's instruction focused on defendant's intent in firing the weapon, whereas defendant's theory was that the discharge itself was accidental. In addition, defendant claims that the court had the obligation to sua sponte instruct the jury that accidental killing is excused in law. However, defendant affirmatively waived any errors when he indicated that he had no objections to the instructions as given. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Therefore, there are no errors to review in this regard. *Id.*

Defendant argues that the prosecutor appealed to the jurors' sympathy by noting that the deceased had lost an arm in Vietnam and by repeatedly referring to the deceased as the "victim" and as a "walking victim." Because defendant did not object to these statements at trial, we review the issue under the plain error test of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). These comments and references were not so inflammatory or such blatant appeals to the jurors' sympathy that they prejudiced defendant. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). They did not constitute plain error as defined in *Carines*.

Defendant also claims that the prosecutor denigrated the defense by referring to defendant's testimony as a story, nonsense, "a bunch of malarkey," a lie and a fabrication. Again, because defendant did not object, we review for plain error in accordance with *Carines*. These remarks were not improper. A prosecutor may argue from the facts that a witness is not worthy of belief and is not required to make the argument in the "'blandest of all possible terms.'" *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), citing *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Defendant has not established plain error.

Defendant contends that defense counsel was ineffective for failing to object to prosecutorial misconduct. Counsel's failure to object to the instances cited by defendant was not below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Moreover, there is no reasonable probability that the result of the proceeding would have been different had counsel objected. *Id.* Therefore, defendant has not established that he was denied effective assistance of counsel on this basis.

Defendant also claims that counsel was ineffective for failing to adequately investigate, prepare and present the defenses of accident and self-defense. Defendant's motion to remand for a *Ginther*¹ hearing has previously been denied by this Court for failure to persuade the Court of the necessity of a remand at that time. We are likewise not persuaded that defendant is entitled to a remand. The affidavit that defendant has supplied fails to set forth the specific facts to be produced at the evidentiary hearing. MCR 7.211(C)(1)(a)(ii). Because there was no *Ginther* hearing, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). The record does not support defendant's claim that expert testimony would have aided his defense, that an investigator would have discovered facts that were useful to the defense, or that defense counsel "did nothing" to investigate the case. Therefore, defendant has not demonstrated ineffective assistance of counsel on this basis.

Defendant argues that his convictions and sentences for both felony murder and the predicate felony of assault with intent to rob while armed violate double jeopardy principles. The prosecution correctly concedes this point. See *People v Gibson*, 115 Mich App 622; 321 NW2d 749 (1982); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Accordingly, we vacate defendant's conviction and sentence for assault with intent to rob while armed.

In a supplemental brief filed in propria persona, defendant claims that the prosecutor knowingly presented perjured testimony. Defendant's argument seems to refer to two separate instances. First, defendant refers to the preliminary examination when a witness, Don Grimmatt, denied seeing defendant in the days before the incident. Defendant has attached to his brief a page from what purports to be a transcript of a statement by Grimmatt in which he states that he saw defendant the night before the incident and "cussed [him] out." Although this line of inquiry was not presented at trial, defendant claims that the allegedly perjured testimony at the preliminary examination affected the bindover. Second, defendant refers to allegedly false trial testimony by James Grimmatt that defendant left the apartment before Don Grimmatt and the

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

decedent. Defendant has attached a page from what purports to be a statement by James Grimmatt in which he states that the decedent, Don Grimmatt and defendant left the apartment together.

Defendant has not demonstrated that he is entitled to relief on this basis. A prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). However, mere inconsistencies between a witness' trial testimony and a prior statement do not establish entitlement to relief, particularly where there is no showing that the prosecutor attempted to conceal the contents of the previous statements from the defense. *People v Wade Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Because the record does not support defendant's claim, he is not entitled to relief on this basis.

We vacate defendant's conviction and sentence for assault with intent to rob while armed, and affirm his other convictions and sentences.

/s/ Michael J. Talbot

/s/ Helene N. White

/s/ Christopher M. Murray